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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOHN MAESTAZ, Defendant and Appellant.	B214394 (Los Angeles County Super. Ct. No. TA096100)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kelvin D. Filer, Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie A. Miyoshi and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant John Maestaz shot and killed Marcus Cardenas. His defense was that he justifiably did so in self-defense and defense of another. He was charged with murder but convicted only of the lesser included offense of voluntary manslaughter and sentenced to 21 years in state prison. Maestaz contends the trial court gave an improper instruction on justifiable homicide, erred in refusing to strike allegations regarding a prior conviction, and abused its discretion in sentencing. We agree the court gave an improper instruction but conclude the error was harmless beyond a reasonable doubt. We find no abuse of discretion in the court's refusal to strike allegations or its other sentencing deliberations. Accordingly, we affirm.

BACKGROUND

Maestaz and his cousin Daniel Melendez, both in their 40's, had been members of the Dog Patch street gang as boys, but Maestaz was inactive and Melendez became disassociated from the gang after he served as a jailhouse informant. Because he had been an informant, Melendez was "green lighted," or authorized to be killed by the gang.

On August 19, 2006, at a birthday party for a Dog Patch gang member, Maestaz was told by Dog Patch members, "If you do not kill your cousin [Melendez], we will kill you and everyone in your family." The next night, as Maestaz and Melendez walked out of Melendez's home, three Dog Patch members, including Cardenas, approached and attacked Melendez. When Maestaz, armed with a gun, responded to Melendez's call for help, two of the assailants fled, Maestaz following, but Cardenas continued to fight with Melendez. After a while the fight ended and Cardenas followed the other two assailants, walking toward Maestaz. Cardenas approached and lunged at Maestaz. Maestaz shot Cardenas twice, killing him.

At trial, Maestaz's defense was that he shot Cardenas to protect not only himself, but Melendez as well. But Melendez testified the fight had ended and Cardenas had walked away from him ("he walked off") and stepped or leaped toward Maestaz when Maestaz shot him. Yvonne Garcia, Melendez's daughter, similarly testified that the fight

between Melendez and Cardenas had ended, and Cardenas had walked away, before Maestaz shot him. Maestaz testified that he shot Cardenas in reaction to Cardenas "coming at" or lunging at him and that he had seen Cardenas pick up a gun.

The trial court gave several instructions pertaining to self-defense and defense of another, including CALCRIM Nos. 505 ("Justifiable Homicide: Self-Defense or Defense of Another"), 571 ("Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense (Pen. Code, § 192)"), and 3474 ("Danger No Longer Exists or Attacker Disabled"). Each instruction informed the jury that a person has a provisional right to defend both himself and others.

The jury acquitted Maestaz of murder but found him guilty of the lesser included offense of voluntary manslaughter.

Before sentencing, Maestaz moved to strike an allegation of a prior conviction pursuant to Penal Code section 1385. The court denied the motion and sentenced him to state prison for the middle term of six years pursuant to Penal Code section 193, subdivision (a), doubled to 12 years pursuant to sections 1170.12, subdivisions (a)–(d), and 667, subdivisions (b) – (i). The court imposed an additional four years pursuant to Penal Code section 12022.5 (firearm enhancement) and an additional term of five years pursuant to section 667, subdivision (a)(1), both enhancements to be served consecutively.

DISCUSSION

Any Instructional Error was Harmless

Maestaz contends the trial court prejudicially erred by eliminating "defense of another" in its written instruction on CALCRIM No. 505.

The trial court instructed the jury orally on CALCRIM No. 505 as follows (italics added): "The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense *or defense of another*. The defendant acted in lawful self-defense *or defense of another* if: one, the defendant reasonably believed that he *or*

someone else was in imminent danger of being killed or suffering great bodily injury; the defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and three, the defendant used no more force than was reasonably necessary to defend against that danger. Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury to himself *or someone else*. Defendant's belief must have been reasonable and he must have acted only because of that belief." But the written version of CALCRIM No. 505 given to the jury omitted the phrase "defense of another" and references to danger to "someone else," effectively misinstructing that only personal self-defense, not defense of another, can be a perfect defense. Maestaz did not note the omission or object to it and the jury asked no question regarding it.

Maestaz argues the jury applied the instruction in an impermissible manner.

A trial court must sua sponte instruct on defenses that are supported by the evidence and not inconsistent with the defendant's theory of the case. (See *People v. Barton* (1995) 12 Cal.4th 186, 195.) "We of course presume 'that jurors understand and follow the court's instructions.' [Citation.] This presumption includes the written instructions. [Citation.] To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control. [Citations.] When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. [Citations.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 803-804.)

We agree the written (but not the oral) instruction setting forth the perfect defense was erroneous. A homicide is justifiable and noncriminal when committed "[w]hen resisting any attempt to murder any person . . . or to do some great bodily injury upon any person . . . ." (Pen. Code, § 197.) The written instruction did not set forth defense of another as justification for homicide. We therefore turn to the question of prejudice.

"Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*People v. Flood* (1998) 18 Cal. 4th 470, 479-480.) "[S]uch misinstruction [is] subject to harmless error analysis under the *Chapman* [*v. California* (1967) 386 U.S. 18, 24] standard of review." (*People v. Cox* (2000) 23 Cal. 4th 665, 676-677.) "Under that test, an error is harmless only when, beyond a reasonable doubt, it did not contribute to the verdict. (*Chapman, supra*, at p. 24.)" (*People v. Williams* (1997) 16 Cal.4th 635, 689.)

We conclude the instructional error was harmless. First, the court orally gave the correct instruction. Although, as Maestaz argues, the court gives primacy to the written version of an instruction if a conflict exists between it and an oral version, "the jury is not informed of this rule. It is thus possible the jury followed the oral instruction." (*People v. Wilson, supra*, 44 Cal.4th at p. 804.) Second, nothing indicates the jury was aware of the difference between the written and oral versions of CALCRIM No. 505, as it asked no questions on this point.

Third, the instructions as a whole were not misleading on whether defense of another can be a perfect defense. In addition to its oral presentation of CALCRIM No. 505, the court in its oral and written presentations of CALCRIM No. 571 expressly instructed that "If you conclude the defendant acted in complete self-defense *or defense of another*, his action was lawful and you must find him not guilty of any crime." (Italics added.) And it instructed, in CALCRIM No. 3474, that a person has the right to defend others.

Fourth, defense counsel in closing argument specifically explained to the jury that reasonable defense of another constitutes a perfect defense. (See *People v. Wade* (1988) 44 Cal.3d 975, 994-995, superseded on other grounds by statute as stated in *People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14 [counsel's argument may be considered in determining whether instructional error was prejudicial].) Defense counsel reviewed the elements of the defense, explaining that "basically, you have to say that the defendant actually believed that he was in imminent danger of being killed or someone else was in

imminent danger of being killed and that he actually believed the immediate use of deadly force was necessary. And in order for it to be then imperfect self-defense, you have to say one of those beliefs is unreasonable." Neither the prosecutor nor defense counsel suggested at any point that defense of another could not be a perfect defense.

Finally, the omission of defense of another as a perfect defense was immaterial, as nothing in the record indicates that when Maestaz shot Cardenas he was defending Melendez from an imminent threat. "For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter. [Citation; fn.] To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable. [Citations.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082. "[F]or either perfect or imperfect self-defense, the fear must be of imminent harm. 'Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury.' [Citation.]" (*Ibid.*) "When that danger has passed and the attacker has withdrawn, there can be no justification for the use of further force." (*People v. Perez* (1970) 12 Cal.App.3d 232, 236.)

Both Melendez and his daughter testified that the fight was over and Cardenas was walking away from Melendez when he was shot. Maestaz himself testified that Cardenas was advancing on and "lunged at" him when he, Maestaz, shot him. Nothing in the record indicates an imminent threat to Melendez existed at that moment. Indeed, defense counsel in closing argument argued it was *Maestaz* to whom Cardenas presented an imminent danger when he was shot. Counsel stated Cardenas "approached John Maestaz yelling in an aggressive manner" and "lunged at him," and Maestaz "found himself in a position where he believed his only choice was to kill or be killed." Defense counsel made no argument about any imminent threat to Melendez. She is supported by the

record, which indicates Maestaz was defending himself, not Melendez, when he shot Cardenas.

Under these circumstances, we are confident that the jury understood the defense-of-another justification for homicide and rendered its verdict accordingly.

Denying Maestaz's *Romero* Motion was Not Error

Before sentencing, Maestaz moved to strike a prior conviction pursuant to Penal Code section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. The court denied the motion. Maestaz contends the court abused its discretion. We disagree.

In 1998 Maestaz was convicted of felony robbery, which is a "serious felony" and strike for purposes of the Three Strikes law. (Pen. Code, §§ 667, subds. (a)(4) & (d)(1); 1192.7, subd. (c)(19).) He was paroled in 2001. In denying Maestaz's motion to strike the allegation of his prior felony conviction, the court stated, "I don't think it would be appropriate, and I don't think the interest of justice called for the court to strike the prior. Certainly it's not remote in time. There don't appear to be any extenuating circumstances as it relates to the defendant's conduct involved in that prior. [¶] I don't think it could be said that he's led a legally blameless life, since the conviction on that prior."

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, . . . or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) A ruling on a motion to strike is subject to review for abuse. (*Id*. at p. 162.) "'The burden is on the party attacking the sentence to "clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary

determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.) Thus, in reviewing sentencing matters appellate courts must apply an "extremely deferential and restrained standard." (*Id*. at p. 981.) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

Under this standard we find no abuse of discretion in the trial court's concluding that Maestaz fell within the spirit of the Three Strikes law.

Maestaz was convicted of one felony (robbery) and four misdemeanors (theft, driving with a suspended license—two convictions, and failure to appear) before the instant conviction. He was sentenced to state prison once and served three years. In moving to have the strike stricken, Maestaz argued he had overcome drug addiction and at the time of the shooting was grief stricken over the death of a son at the hands of another family member. He argues here that the strike offense occurred eight years before the current offense, no evidence suggests the offenses are related or similar, he is gainfully employed, he successfully left the gang culture of violence and crime, and the current offense was essentially motivated by self-defense.

Little about Maestaz's record is favorable to his position. Five years after his release from prison on a felony conviction he carried a firearm, visited a Dog Patch gang party, and later unreasonably shot and killed a Dog Patch member. No extraordinary circumstances would compel reasonable minds to agree he falls outside the spirit of the Three Strikes scheme. The trial court could therefore reasonably conclude he is a

recidivist who will not conform to the law, which puts him within the spirit of the Three Strikes scheme.

The Court Did Not Abuse Its Discretion in Sentencing

The trial court originally sentenced Maestaz to a prison term of 16 years, including the middle term of six years on the manslaughter conviction. (Pen. Code, § 193, subd. (a).) In doing so, it refused to impose an additional five-year term mandated by subdivision (a)(1) of Penal Code section 667, which requires the enhancement when a person convicted of a serious felony has a prior conviction for a serious felony. But when the prosecution pointed out the error, the court added the five-year enhancement. After it did so, defense counsel suggested the court reconsider its original ruling and sentence Maestaz to the low term of three years, rather than the middle term of six, which would then be doubled and, with enhancements, result in a total sentence of 15 years, which the defense argued would be in keeping with the court's original decision to impose 16 years. The court refused, stating it does not impose sentence with a target number in mind, but selects the base term in light of the circumstances of the case and then imposes enhancements as required. Maestaz contends the court abused its discretion in refusing to reconsider his sentence. We disagree.

Again, the burden is on the party attacking the sentence to clearly show the sentencing decision was so irrational or arbitrary that no reasonable person could agree with it. (*People v. Carmony*, *supra*, 33 Cal.4th at pp. 376-377.)

Maestaz argues the trial court improperly concluded it had no authority to review its discretionary sentencing choice to impose the middle term. This constitutes a failure to exercise discretion, he argues, which is an abuse of discretion. (*People v. Benevides* (1998) 64 Cal.App.4th 728, 735.) The argument fails on a faulty premise: The trial court did not conclude it lacked discretion to review imposition of the middle term, it concluded only that it lacked discretion not to impose mandatory enhancements. And it did not refuse to review the discretionary component of Maestaz's sentence, it merely refused to change its ruling after the review: "[M]y reasons for indicating that I believe

the circumstances in aggravation were balanced by circumstances in mitigation, that still applies. . . . [T]hey still balance each other out to the point where I believe the midterm is appropriate for count I." This was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.